1997

Tage M. Nyman v. R. Daryl McDonald : Brief of Appellee

Utah Court of Appeals

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BEFORE THE UTAH COURT OF APPEALS

TAGE M. NYMAN	)	
Plaintiff/Appellee,	)	
vs.	)	Appellate Court No. 970692
R. DARYL McDONALD,	)	Priority No. 15
Defendant/Appellant.	)	

BRIEF OF APPELLEE

APPEAL FROM FINAL ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF APPELLEE AND AGAINST APPELLANT
ENTERED BY THE THIRD JUDICIAL
DISTRICT COURT, DIVISION I, SALT LAKE COUNTY
STATE OF UTAH
THE HONORABLE PAT B. BRIAN PRESIDING

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STATEMENT OF JURISDICTION

The Supreme Court has original jurisdiction pursuant to Utah Code Annotated, Section 78-2-2(3)(j) (1966) to hear appeals from final orders such as an order granting summary judgment. "The Supreme Court has appellate jurisdiction ...over orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction." The Court of Appeals is granted "pour over" jurisdiction from matters which the Supreme Court determines in its discretion and prior to having set the matter for oral argument, should be transferred to the Court of Appeals. See Rule 42(a), Utah Rules of Appellate Procedure. This matter was duly "poured over" to the Court of Appeals by order dated November 19, 1997, and the appellate case number was changed from 970342 to 970692.

STATEMENT OF ISSUES ON APPEAL

Standard of Review in the Trial Court:

Motions for Summary Judgment are governed by URCP 56(c), which provides summary judgment is appropriate only when "(1) there is no genuine issue as to any material fact and ---- (2) the moving party is entitled to judgment as a matter of law."

Any affidavit either in favor of or opposing a motion for summary judgment "must contain specific evidentiary facts showing that there is a genuine issue for trial." **Treloggan v. Treloggan,** 669 P.2d 747 (Utah, 1985) (quoting **Jones v. Hinkle**, 611 P.2nd 733 (Utah, 1980).

As in this case, where the Appellant does not provide a supporting affidavit in support of his motion for summary judgment, but relies on the pleadings and the depositions of the parties,

to be effective, the testimony relied upon in the depositions and other sworn statements must be admissible into evidence; parol evidence used to vary or interpret the terms of a contract or the understanding of parties proffered to construe the meaning of an agreement may not be admissible and may be subject to a motion to strike. **Rainford v. Rytting**, 22 Utah 2nd 252, 451 P.2nd 769 (1969).

In a motion for summary judgment any witness, not just a party, who has knowledge of the facts, can make an affidavit as to any of the material facts. **Western Pac. Transp. Co. V. Beehive State Agric. Coop**., 597 P2d 854 (Utah, 1979).

Where it appears to the Court in a motion or counter motion for summary judgment that there exists a dispute as to any material fact, summary judgment must be disallowed **Bill Brown Realty, Inc. v. Abbott,** 562 P.2nd 238 (Utah, 1977) Even where the parties are not in complete conflict with one another, but the understanding, intention, and consequences of those facts are vigorously disputed, the matter is not proper for summary judgment, and can only be resolved at trial. **Sandberg v. Klein**, 576 P.2d 1291 (Utah, 1978).

Of course, if the court is to grant a motion for summary judgment, the court must determine there are no material facts which are in dispute, and the court must look at those facts most favorably to the non-moving party. In so doing the court may not consider the weight of the testimony or the credibility of the witnesses. **Singleton v. Alexander**, 19 Utah 2.d 292, 431 P.2d 126 (Utah, 1967).

Standard of Review in the Appellate Court:

On appellate review of an order granting summary judgment from the trial court, the party against whom the judgment has been granted is entitled to have all the facts presented, and all the

inferences fairly arising therefrom, considered in a light most favorable to him. **Morris v. Farnsworth Motel,** 123 Utah 289, 259 P.2d 297 (1953) Hence the same standard as applies at trial court level is applied by the appellate court. **Durham v. Margetts**, 571 P.2d 1332 (Utah, 1977)

The appellate court is free to reappraise the trial court's legal conclusions. **Barber v. Farmers Ins. Exch.**, 751 P.2d 248 (Utah Ct. App. 1988)

Summary judgment is not precluded, however, simply because there remain some fact or facts in dispute, but only when a *material* fact is genuinely controverted. **Heglar Ranch, Inc. v. Stillman**, 619 P.2d 1390 (Utah, 1980)

The appellate court may rule on facts that are not genuinely not in dispute. **Sorensen v. Beers**, 585 P.2d 458 (Utah, 1978).

Issues Presented on Appeal:

The Utah Court of Appeals is asked to determine whether the trial court acted properly when it granted to the Plaintiff/Appellee his motion for Summary Judgment, and in so doing, quieting title to the four parcels in question in favor of Appellee.

The case arises out of a non-judicial foreclosure on the sale of four rental units from the Appellee to the Appellant on February 8, 1993. Shortly after the parties closed on the properties, the Appellant stopped making the monthly installments on the all-inclusive real estate trust deed notes. Further, he failed to secure and notify the Plaintiff of the presence of fire insurance on the parcels, and allowed at least one of the properties to remain uninhabitable for a significant period of time following the filing of the Notices of Default.

The Appellee filed a Notice of Default on three of the parcels on June 18, 1993, and a

Notice of Default on the fourth parcel on October 25, 1993.

The Appellant claims he called the parties' escrow agent in early July, 1993 to determine what was necessary to cure the default and that on July 8, 1993 he brought in a cashier's check and cash totaling $7,245.00, sufficient to cover the defaults against three parcels in question.

While thereafter the Appellant attempted to collect rents for a couple of months following July 8, 1993, he made no further payments against the trust deed notes, and has made no further payments nor tenders to this date.

The trial court found the following:

(1) That almost from the beginning the Appellant defaulted on the trust deeds and trust deed notes.

(2) The initial down payment amounts were due no later than 45 days after signing of the trust deed notes, and could be added to the total amounts in default due the Appellant as of June 18, 1993 in his Notices of Default and for purposes of determining whether the Appellant had cured the defaults as of July 8, 1993.

(3) That in all respects the Notice of Default were appropriate.

(4) That while the Appellate attempted to cure the defaults on July 8, 1993, there remained sums owing which were never paid to cure the defaults on the trust deed notes.

(5) No attempt was ever made to cure the default on the fourth trust deed note.

(6) Even assuming the escrow agent was asked by the Appellant what was required to cure the defaults, the amount paid failed to cure the default.

(7) The escrow agent had absolute discretion as to how to apply any payments received, absent written direction from both the Appellee and the Appellant.

(8) If the non-judicial foreclosures were proper, the Appellant's title could not have been slandered.

Appellant takes issue with nearly all of these findings and urges the court to find that there are material issues of fact which remain to be adjudicated, or in the alternative, to find that his cross motion for summary judgment against the Appellee should have been granted..

DETERMINATIVE STATUTES

> Rule 42(a) Discretion of Supreme Court to transfer. "At any time before a case is set for oral argument before the Supreme Court, the Court may transfer to the Court of Appeals any case except those cases within the Supreme Court's exclusive jurisdiction. The order of transfer shall be issued without opinion, as to the merits of the appeal or the reasons for the transfer."

Section 57-1-24(1), UCA, provides in pertinent part:

"The power of sale conferred upon the trustee may not be exercised until:

> (1) The trustee files for record, in the office of the recorder of each county where the trust property...is situated, a notice of default, identifying the trust deed by stating the name of the trustor named therein and giving the book and page where the trust deed is recorded and a legal description of the trust property, and containing a statement that a breach of any obligation for which the trust property was conveyed as security has occurred, and setting forth the nature of that breach and of his election to sell or cause to be sold the property to satisfy the obligation."

Section 57-1-31, UCA, provides in pertinent part:

> "(1) Whenever all ....of the principal sum of any obligation secured by a trust deed has, prior to the maturity date fixed in such obligation become due or been declared due by reason of a breach or default in the performance of any obligation secured by the trust deed, including a default in the payment of interest or of any installment of principal, or by reason of failure of the trustor to pay, in accordance with the terms of the trust deed, taxes, assessments, premiums for insurance, or advances made by the beneficiary in accordance with the terms of such

> obligation with the terms of the such obligation or of such trust deed, the trustor....at any time within three months of the filing for record of notice of default under such trust deed, if the power of sale be exercised, may pay to the beneficiary or his successor in interest the entire amount then due under the terms of such trust deed (including costs and expenses actually incurred in enforcing the terms of such obligation, or trust deed, and the trustee's and attorneys's fees actually incurred, other than such portion of the principal as would not then be due had no default occurred, and thereby cure the default theretofore existing, and thereupon, had or instituted shall be dismissed or discontinued and the obligation and trust deed shall be reinstated and shall be and remain in force and effect the same as if no such acceleration had occurred."

STATEMENT OF THE CASE

Nature of the Case

This case involves an appeal from an order of the trial court granting the Plaintiff/Appellee a Summary Judgment against the Defendant/Appellant. Appellee sought to Quiet Title in a four parcels of property which Appellant had purchased via trust deeds and trust deed notes and on which he is alleged to have defaulted almost from the beginning.

Appellant claims he brought delinquent amounts current on three parcels where Notices of Default had been filed on July ;8, 1993, less than one month after the Notices of Default had been filed. He claims that the escrow agent chosen by the parties to receive the funds to be paid by the Appellant, had accepted the funds on behalf of Appellee, thus nullifying the Notices of Default, and prohibiting the Appellee from proceeding with his non-judicial foreclosure.

Course of Proceedings:

On or about September 3, 1993 the Appellee commenced an action for breach of contract against the Appellant for failure to make payments under the trust deed notes and associated trust

deeds in Murray Circuit Court as Case No. 930008740. (Tr. 1-9) Appellant not only sought damages for Appellant's failure to make monthly installments from July 1, 1993 forward, but also sought a restraining order, restraining the Appellant from attempting to collect rents. (Tr. 1-9)

On October 22, 1993, the parties consented to removing the case to Third District Court (Tr. 66). The case was given a new case number of 930906589.

In the meantime, a non-judicial sale on the three parcels of property took place on October 18, 1993. (Tr. 211-220)

On November 23, 1993, the Appellant filed an Answer and Counterclaim, generally alleging that all payments up to and through July 31, 1993 were brought current by the July 8, 1993 payment to the Escrow Agent and seeking to Quiet Title to the subject properties in the Appellant's favor, and seeking an accounting and damages for alleged breach of fiduciary. (Tr. 71)

On March 10, 1993 the Appellant filed his first motion for summary judgment against the Appellee, seeking to Quiet Title in favor of Appellant. (Tr. 92) No memoranda or supporting affidavits were filed in support of Appellant's first motion for summary judgment until August 11, 1994 (Tr. 152) Objections were timely filed by Appellee, together with counter-affidavits. (Tr. 94, 139.)

Pursuant to a scheduling order dated May 27, 1994, (Tr. 142), Appellant's deposition was scheduled for July 19, 1994 May 29, 1994 . The Appellant never appeared at the scheduled deposition. Additionally, no responses were received to Appellee's interrogatories and demand for production of documents.

Appellee filed his own Motion for Summary Judgment on September 29, 1994, along with a Memorandum in Support of the Motion and supporting affidavits. (Tr. 176)

The First Motion for Summary Judgment was heard on November 10, 1994, and the trial court denied the cross motions for summary judgment and calendared a scheduling conference for December 8, 1994. The court further ordered that Appellant McDonald make himself available for the taking of his deposition before the scheduling conference. (Tr. 294) Accordingly, his deposition was scheduled for November 29, 1994.

Following Appellant's failure to appear for his deposition a second time, Appellee filed a motion to strike the pleadings and enter his default. This motion was ultimately denied, inasmuch as it was discovered the Appellant was incarcerated in a federal prison in California. (Tr. 326) A trial date was nevertheless set for May 4, 1995. (Tr. 327)

At a hearing on April 4, 1995, the parties tentatively agreed, at the urging of the court, to a global settlement of the case, which was reduced to writing and signed by counsel for the various parties, dated May 22, 1995 and filed with the court. (Tr. 340)

On November 20, 1995, the Appellant moved to reconsider the summary judgment (sic.) granted by the court. The Appellant claimed he had not been involved in the decision to dismiss the claims of the parties and had not signed the Stipulation of Dismissal. (Tr. 347).

At a hearing on August 29, 1996, the court granted Appellant's motion to set aside the Order of Dismissal and ordered return the $4,200.00 paid to Appellee which had been paid by him in settlement of the claims of Appellant. (Tr. 664)

At the Court's suggestion, the parties filed cross motions for Summary Judgment a second time. (Tr. 700, 818)

At a hearing on April 24, 1997, the cross motions for summary judgment was heard, and the court granted Appellee's Motion for Summary Judgment against the Appellant, and requested specific findings and conclusions be prepared by Appellee's counsel.(Tr. 1064, 1074). These were prepared and mailed to counsel for Appellant on June 4, 1997. (Tr. 1073)

Counsel for Appellant filed objections to the proposed findings and order on June 2, 1994. (Tr. 1051)

The order granting summary judgment was signed by the court on June 10, 1997. (Tr. 1076)

No ruling was made on the Objections of Appellant, presumably because of lateness, and counsel for Appellant filed a Motion for Relief from the Court's Order granting summary judgment on June 13, 1997. (Tr. 1078).

Though a Notice to Submit for Decision was filed on the motion for relief by counsel for Appellant June 26, 1997 (Tr. 1116); no hearing or decision was made by the Court; though the court had scheduled a hearing for September 5, 1997. (Tr. 1123)

That hearing was superceded by an appeal filed by the Appellant on July 2, 1997, and thus taking jurisdiction to hear the objections by the trial court. (Tr. 1118) The Appellant certified that no part of the transcript was being requested in connection with the appeal itself. (Tr. 1121)

Statement of Facts

1. At all times relevant to these proceedings, the Appellee was the owner of four parcels of real property situated in Salt Lake County, State of Utah, with the following addresses:

(A) 110 West Commonwealth Ave.

Salt Lake City, Utah

(B) 1734 South West Temple
Salt Lake City, Utah 84116

(C) 1646 South West Temple
Salt Lake City, Utah

(D) 124-128 West 1700 South
Salt Lake City, Utah.

(See Tr. 1065)

2. The Defendant had previously entered into a purchase agreement to purchase the four properties from a PATRICK McCAULEY, in early 1992, and had had possession of the four properties from approximately August, 1992 until the sale by the Plaintiff to the Defendant in February, 1993. All of these properties were older structures and were in urgent need of maintenance and upkeep. Inasmuch as the Defendant had maintained possession of the properties for approximately five months prior to the sale by the Plaintiff , the Defendant was well aware of their condition, when he agreed to purchase the properties in an "as is" condition from the Plaintiff. (Tr. 851-885 and 1066-1067)

4. The Defendant further knew that the Salt Lake County Health Department had closed the property at 110 West Commonwealth to human habitation in April, 1993, two months after he took possession from the Plaintiff. (Tr. 972, 973,974, and 1067)

5. The Defendant did not make the payments due under the trust deed at 110 West Commonwealth after it had been shut down by the Health Department in April, 1993. (Tr. 1067)

6. The Defendant failed to cure the deficiencies prior to the time provided by the Notice

of Default for so doing. (Tr. 1068)

8 Originally the Defendant claimed he had cured all defaults on all of the properties by payment on July 8, 1993 (sic.). (Tr. 949) He now admits, however, that he had cured the defaults of only three of the properties prior by his payment of July 8, 1993 to Draper Bank and Trust. (Ktr. 872)

9. The properties were sold by the Plaintiff to the Defendant via Trust Deeds and Notes dated February 8, 1993. (Tr. 1068)

10. The parties chose as their escrow agent for purposes of receiving and disbursing funds received from the Defendant on the various properties, Draper Bank and Trust, Draper, Utah. (Tr. 1069)

11. In addition to the Trust Deeds and Trust Deed Notes, and the Escrow Agreements signed by the parties for each of the parcels in question, the parties also executed at closing a Purchase Agreement. General terms of each agreement were set forth. (Tr. 889-890)

12. On June 18, 1993, the Plaintiff caused Notices of Default against three of the properties to be filed with the Salt Lake County Recorder's Office, claiming a breach of the obligations by the Defendant under the terms of the Trust Deed and/or Trust Deed Notes. (Tr. 1070) The properties listed were (A) 110 Commonwealth Ave., (B) 1734 South West Temple, and (C) and 1646 South West Temple.

13. A Notice of Default was recorded against the fourth property, 124-128 West 1700 South on October 25, 1993, claiming the Defendant had defaulted also on the terms on conditions of the Trust Deed and Trust Deed Note. The Plaintiff then elected pursuant to the terms of the Trust Deed to accelerate the balance due on the note. (Tr. 1069-1067)

14. On or about July 6, 1993, the Defendant tendered to Draper Bank and Trust, the escrow agent for the parties, an Official Check for $6,900.00. (Tr. 1067-1068) At no time did the Appellant attempt to contact the Appellee concerning the alleged cure or to find out what, if anything additional, was required to cure the default. (Tr. 851-885)

15. The Defendant made no further attempts following July 6, 1993 to tender or make further payments to Draper Bank & Trust under the terms of the escrow agreement with the Plaintiff. (Tr. 1068)

16. Following a demand to do so, Appellant failed to provide Appellee with proof of any fire insurance of any of the subject properties prior to June 18, 1993 or at any time thereafter. (Tr. 974, 980)

17. According to sworn statements from SANDY STEENECK, an employee who maintained records for Draper Bank and Trust for these for these four escrow agreements, the Defendant was delinquent as of July 12, 1993 under the terms thereof. (Tr. 963-970) This was after the Appellant had made his payment allegedly brining all delinquencies current on the three properties subject to Notices of Default on July 8, 1993. MS. STEENECK acknowledged that he had brought the four contract monthly payments current, but had failed to pay the "balloon payments".

18. According to the sworn statement of KELLY SORENSON, Senior Account Agent for Allstate Insurance, no policies of insurance could be found as having been issued in the name of the Defendant, DARYL McDONALD for any of the subject properties at any time. (Tr. 971) This despite the Defendant's assertions under oath that he had secured insurance for the properties as required under the Trust Deeds. (Tr. 851-885)

19. On or about September 27, 1993, the Defendant was notified of certain deficiencies which existed and which violated both building and health ordinances, by Salt Lake City Corporation on the property at 1646 South West Temple. (Tr. 972)

20. The Defendant made no attempts to make any repairs. (Tr. 962)

21. Following July 6,1993, the date the Appellant allegedly brought the payments current on three of the properties, the Appellee expended considerable sums of money for repairs and upkeep. (Tr. 975-977)

22. At the time of closing, the Defendant entered into an agreement with the Plaintiff to purchase the four parcels for no money down; however each of the Trust Deed Notes called for one extra monthly payment to be paid within forty-five days of closing. These payments were never made by the Defendant. (Tr. 957-970)

23. Defendant further did not keep up the grounds to the extent that Salt Lake City maintenance crews were required to clean the properties of weeds and debris, and for which they charged $271.00 that attached as a lien against the properties. The Defendant never paid to reimburse the City for these costs. (Tr. 972-974)

SUMMARY OF THE ARGUMENT

Appellee claims there were several breaches of the trust deeds and/or trust deed notes prior to June 18, 1993 which were not cured with the tender of payment by Appellant on July 8, 1993 of $7,245.00 to Draper Bank and Trust. These breaches are not disputed; though the legal effect is in dispute. Appellee asserts summary Judgment was thus appropriate.

Appellee claims that although the parties' escrow agent was designated by them to receive and disburse payments made by the Appellant, the escrow agent was not in a position to

know if any alleged default had been or would be cured by receipt of any payment; furthermore, the escrow agent was authorized to apply payments to all contracts equally unless otherwise agreed upon by the parties. Receipt by the escrow agent of $7,245.00 on July 8, 1993 from Appellant does not necessarily cure defaults against three of the properties admitted to be in default, and does not waive Appellee's rights to claim defaults exist beyond date of receipt of less than sums required to cure a default.

The Notices of Default filed by the Appellee were sufficiently clear, and sufficiently followed statutory guidelines so as not to be defective.

If the Appellant is in default, Appellee could not be held liable for claimed slander to any title claimed by Appellant.

The Findings of Fact and Conclusions of Law, not challenged by the Appellant, are sufficiently clear to uphold court's grant of Summary Judgment in Appellee.

ARGUMENT

POINT I

A SIMPLE ACCOUNTING OF RECEIPTS VS. PAYMENTS TO HAVE BEEN MADE BETWEEN FEBRUARY 8, 1993 AND JULY 12, 1993 SHOWS THE APPELLANT WAS IN DEFAULT.

The Appellant should have paid to Draper Bank and Trust the sum of $14,212.50 from between February 8, 1993 and July 12, 1993. The total payments actually received by Draper Bank and Trust during the period in question from the Appellant was only $11,845.00. Total funds DARYL McDONALD was deficient as of July 12, 1993 was $2,367.50. Even if you deduct the rent that TAGE NYMAN collected prior to 4/20/93 of $1,050.00, this still leaves a

balance of $1,117.50 which was unpaid as of July 12, 1993.

These figures, of course, do not includes costs of foreclosure and legal fees for which the Appellant is responsible under the trust deeds and trust deed notes incurred up to July 12, 1993.

Furthermore, the Appellant had been placed on notice by letter dated April 20 19943 from the Appellee that a default under the contract had occurred inasmuch as he had never received proof of fire insurance on the four properties; this proof has never been provided to this day.

The undisputed accounting of monies received vs. amounts due under the contract prior to July 8, 1993 is as follows:

The property at 1646 South West Temple given the contract numbered F-18028 provided for the following payment terms:

Purchase Price: $53,000.00

Payment Terms: Monthly installments of $550.00 per month commencing with a principal payment of $550.00 due 45 days from February 8, 1993, and the remaining principal balance of $43,450.00 together with interest at 10.5% per annum payable in monthly installments of $550.00 staring March 1, 1993 with monthly installments of the same amount due on the first day of each month thereafter until February 1, 2000, when the remaining principal and accrued interest was due. A late payment penalty of 5% of the monthly payment was to be assessed is the payment was not received within ten days of the payment due date. In addition, the maker was to pay all property taxes, when due, and fire insurance premiums when due, and provide the seller with evidence of said payments.

March 1, 1993 $550.00

March 23, 1993 $550.00

Late Fee:	$ 27.50
April 1, 1993	$550.00
Late Fee:	$ 27.50
May 1, 1993	$550.00
Late Fee:	$ 27.50
June 1, 1993	$550.00
Late Fee	$ 27.50
July 1, 1993	$550.00
Late Fee:	$ 27.50
Total Due:	$3,437.50

The property at 124-128 West 1700 South, given the contract numbered F-18029 provided for the following payment terms:

Purchase Price: $45,000.00

Payment Terms: Monthly installments of $550.00 per month commencing with a principal payment of $550.00 due 45 days from February 8, 1993, and the remaining principal balance of $43,450.00 together with interest at 10.5% per annum payable in monthly installments of $550.00 staring March 1, 1993 with monthly installments of the same amount due on the first day of each month thereafter until February 1, 2000, when the remaining principal and accrued interest was due. A late payment penalty of 5% of the monthly payment was to be assessed is the payment was not received within ten days of the payment due date. In addition, the maker was to pay all property taxes, when due, and fire insurance premiums when due, and provide the seller

with evidence of said payments.

March 1, 1993	$550.00
March 23, 1993	$550.00
Late Fee:	$ 27.50
April 1, 1993	$550.00
Late Fee:	$ 27.50
May 1, 1993	$550.00
Late Fee:	$ 27.50
June 1, 1993	$550.00
Late Fee	$ 27.50
July 1, 1993	$550.00
Late Fee:	$ 27.50
Total Due:	$3,437.50

The property at 1734 South West Temple, given the contract numbered F-18030 provided for the following payment terms:

Purchase Price: $53,000.00

Payment Terms: Monthly installments of $550.00 per month commencing with a principal payment of $550.00 due 45 days from February 8, 1993, and the remaining principal balance of $51,450.00 together with interest at 10.5% per annum payable in monthly installments of $550.00 staring March 1, 1993 with monthly installments of the same amount due on the first day of each month thereafter until February 1, 2000, when the remaining principal and accrued interest was due. A late payment penalty of 5% of the monthly payment was also due for any

payment made ten days or more past the due date.

The property at 110 West Commonwealth Ave., given the contract numbered F-18030 provided for the following payment terms:

Purchase Price: $53,000.00

Payment Terms: Monthly installments of $550.00 per month commencing with a principal payment of $550.00 due 45 days from February 8, 1993, and the remaining principal balance of $51,450.00 together with interest at 10.5% per annum payable in monthly installments of $550.00 staring March 1, 1993 with monthly installments of the same amount due on the first day of each month thereafter until February 1, 2000, when the remaining principal and accrued interest was due. A late payment penalty of 5% of the monthly payment was to be assessed is the payment was not received within ten days of the payment due date. In addition, the maker was to pay all property taxes, when due, and fire insurance premiums when due, and provide the seller with evidence of said payments.

March 1, 1993	$550.00
March 23, 1993	$550.00
Late Fee:	$ 27.50
April 1, 1993	$550.00
Late Fee:	$ 27.50
May 1, 1993	$550.00
Late Fee:	$ 27.50
June 1, 1993	$550.00
Late Fee	$ 27.50

July 1, 1993 $550.00

Late Fee: $ 27.50

Total Due: $3,437.50

The property at 110 West Commonwealth Avenue, given the contract numbered F-18031 provided for the following payment terms:

Purchase Price: $53,000.00

Payment Terms: Monthly installments of $650.00 per month commencing with a principal payment of $650.00 due 45 days from February 8, 1993, and the remaining principal balance of $51,450.00 (sic.) together with interest at 12% per annum payable in monthly installments of $650.00 starting March 1, 1993 with monthly installments of the same amount due on the first day of each month thereafter until February 1, 2000, when the remaining principal and accrued interest was due. A late payment penalty of 5% of the monthly payment was to be assessed is the payment was not received within ten days of the payment due date. In addition, the maker was to pay all property taxes, when due, and fire insurance premiums when due, and provide the seller with evidence of said payments.

March 1, 1993 $650.00

March 23, 1993 $650.00

Late Fee: $ 30.00

April 1, 1993 $650.00

Late Fee: $ 30.00

May 1, 1993 $650.00

Late Fee: $ 30.00

June 1, 1993	$650.00
Late Fee	$ 30.00
July 1, 1993	$650.00
Late Fee:	$ 30.00
Total Due:	$4,050.00

The total the Appellant should have paid on all four contracts for monthly payments and late fees only From February 8, 1993 to July 12, 1993 should have been $14,212.50.

The undisputed allocation of payments received from the Appellant by Draper Bank and Trust to Contract No. 06658:

3/1/93	$550.00
5/1/93	$550.00
7/1/93	$1,732.50

The undisputed allocation of payments received from the Appellant by Draper Bank and Trust to Contract No. 06659:

3/1/93	$550.00
5/1/93	$550.00
7/1/93	$1,732.50

The undisputed allocation of payments received from the Appellant by Draper Bank and Trust to Contract No. 06660:

3/1/93	$650.00
5/1/93	$650.00
7/1/93	$2,047.50

The undisputed allocation of payments received from the Appellant by Draper Bank and Trust under Contract No. 06661:

3/1/93	$550.00
5/1/93	$550.00
8/1/93	$1,732.50

The undisputed total of payments received from the Appellant during the period in question by Draper Bank and Trust is $11,845.00.

POINT II

THERE ARE NUMEROUS OTHER DEFAULTS WITH RESPECT TO EACH OF THE PROPERTIES WHICH WERE NEVER CURED BY THE APPELLANT WITHIN THE NINETY-DAY PERIOD.

Neither party disputes that they entered into written documents represented by Trust Deed Noted secured by Trust Deeds dated February 8, 1993 for the purchase by the Appellant from the Appellee for each of the four parcels in question.

Neither party contends they are not bound by the terms and conditions of those Trust Deed Notes and Trust Deeds with respect to the four properties in question.

It is undisputed that the Appellant was in default on the payments to the properties prior to the time the Appellee filed the Notices of Default on three of the properties on June 18, 1993. The Appellee knew it, Draper Bank and Trust knew it, and the Appellant knew it.

It is further undisputed that the Appellant knew that one of the properties, 110 West Commonwealth Ave., Salt Lake City, Utah, had been condemned to human habitation in April, 1993, and he was thus unable to make payments on that property prior to the filing of the notice

of default.

It is also undisputed that the Appellant made no further payments on any of the properties after July 8, 1993.

It is undisputed that the parties agreed to make Draper Bank and Trust as their Escrow Agent for the purpose of collecting monies under the various Trust Deed Notes and Trust Deeds on the four properties and to pay those funds as directed by the Escrow Agreement for the benefit of the Appellee.

Neither party disputes the accounting given by Draper Bank and Trust with respect to the actual funds received from the Appellant.

The Appellant admits to not having paid the Appellee the extra monthly payment due in March, 1993, which was due within forty-five days of closing.

It is undisputed that the properties were not kept up prior to June 18, 1993 such that Salt Lake City Corporation charged for costs of cleaning debris and weeds upon the one of the properties, and charged against the property as a lien, the sum of $271.00, and that this sum was never reimbursed to the Appellee.

Each of the All-Inclusive Trust Deed Notes signed by the Appellant in favor of the Plaintiff called for the payment of a "principal only payment....due within 45 days from February 8, 1993."

Each further called for monthly payments (at separate stated amounts) to commence March 1, 1993 and to be payable on the first day of each and every month thereafter.

Each and every All-Inclusive Trust Deed Note provided that the maker was to pay property taxes and fire insurance premiums when due and to provide the Appellee with evidence

thereof.

Each and every All-Inclusive Trust Deed Note provided that the properties were non-assignable, non-assumable. and non-transferrable without the written consent of the Appellee.

Each and every All-Inclusive Trust Deed Note provided that there was to be a five percent late fee when any payment was not received within ten days of the due date.

Each and every All-Inclusive Trust Deed Note provides in paragraph nine thereof:

> "In the event that any payment under this Note is not made or any obligation provided to be satisfied or performed under this Note or the All-Inclusive Trust Deed securing this Note is not satisfied or performed at the time and in the manner required. Holder, at his option and without notice or demand, may declare the entire principal balance, all amounts of accrued interest and all other amounts then due under the terms of this Note and the All-Inclusive Trust Deed securing this Note Immediately due and payable."

Default No. 1: The evidence is undisputed that the Appellant was in fact in default under the terms and conditions of the four contracts as of July 12, 1993, in that he had not pay to Draper Bank and Trust the total sums then due under the contracts.

To counter this contention the Appellant claims that he brought all delinquent payments current with his payment of $6,900.00 official check and $345.00 cash payment on July 8, 1993. To come up with this conclusion, however, the Appellant has to assert that the payments due on the four properties on March 23, 1997 was not a monthly payment, but in fact was a "balloon payment" not subject to the Demand of Appellee to cure monthly payments; that there were no legal fees payable; and that there were no other breaches of the contracts. He further contends that without the "balloon payments" being added into the mix, the payment of $7,245.00 on July 12, 1993 brought all four contracts current.

Finally, he contends that even if you add the "balloon payments" into the mix, the payment of $7,245.00 on July 12, 1993 exceeds the amount necessary to have brought the three contracts then subject to a Notice of Default current The logic there is that there was no need to bring the fourth contract current because there had been no demand for payment by the Appellee, and no Notice of Default filed.

Because the Appellant has no evidence, other than parol evidence that he instructed WINDY SMITH on July 12, 1993 to cure the defaults with his $7,345.00 payment, there is insufficient evidence to show that her allocation of the funds among the four contracts was anything other than correct. It is interesting to note that the trial court disregarding what the Appellant claimed to have told WENDY SMITH concerning how his payments were to be applied, since his affidavit on that issue was both unsigned and was not notarized. (Tr. 300)

Whether the Appellant was required to make the payment due on each of the contracts due on March 23, 1993 to cure the Default Notices is a legal question for this Court to determine.

Default No. 2: The Appellant in this case has not given any written notice to the Appellee providing confirmation of the placement of fire insurance on the four subject properties, despite a demand to do so by the Appellee in writing in April, 1993.

Default No. 3: The Appellant has failed to pay for the costs of foreclosure, interest, legals fees and other costs of foreclosure, interest and legals fees incurred in connection with it.

Default No. 4. The Appellant has failed to reimburse the Appellee for his out-of-pockets costs incurred in maintaining the property while Appellant has been otherwise disposed of or has lost interest in the proeprty.

The Appellee has been required by Wfdpf fp ppf fprec;psipf fpregpstscfDe

POINT III

APPELLANT MADE DRAPER BANK AND TRUST HIS AGENT FOR ACCOUNTING PURPOSES AND NOW CANNOT CONTEND HIS PAYMENTS WERE FOR THE PURPOSE OF CURING DEFAULTS ON ONLY THREE OF THE PROPERTIES.

The Appellant next argues that Draper Bank and Trust is the Appellee's agent, and by having accepted the $7,245.00 payment on July 12, 1993, means that the Appellee, himself , has waived the right to claim the payments were not then brought current, especially where Draper Bank and Trust admits it does not accept partial payments.

The Appellant claims that Draper Bank and Trust Company employee, WENDY SMITH, told the Appellant that the $7,245.00 would cure the default. Interestingly enough, WENDY SMITH does not recall having told the Appellant any such thing.

While it is true that Draper Bank and Trust was Plaintiff's agent for the purposes receiving and disbursing funds from the Appellants was the Appellant's agent. In fact, the Appellant is the one who insisted upon u collecting and disbursing funds received from the Appellant, it is also true that Draper Bank sing an escrow agent, and he selected Draper Bank and Trust. If the Appellee is to be bound, then the Appellant must also be bound by the actions of the agent. The agent shows that the Appellant never brought the accounts current by July 8, 1997.

POINT IV

THE APPELLANT NEVER TOOK INTO CONSIDERATION FEES AND COSTS WITH RESPECT TO CURING THE

DEFICIENCIES AGAINST THE THREE PROPERTIES

Each and every All-Inclusive Trust Deed Note provides in paragraph ten thereof:

> "In the event that any payment under this Note is not made, or any obligation provided to be satisfied, or performed under this Note or the All-Inclusive Trust Deed securing this Note is not satisfied or performed at the time and in the manner required, the defaulting party shall pay any and all costs and expenses (regardless of the particular nature thereof and whether or not incurred in connection with the exercise of the power of sale provided for in the All-Inclusive Trust Deed securing this Note) which mazy be incurred from time to time by the Holder hereof without in any way affecting the liability of such parties. No course of dealing between the Maker and Holder in exercising any rights hereunder, shall operate as a waiver of rights of Holder.

When any deficiency declared under a Notice of Default is to be cured, the defaulting party, pursuant Section 57-1-31, UCA, and in accordance with paragraph ten of the All-Inclusive Trust Deed Notes, must also pay and fees and/or legal costs incurred with respect to that default incurred by the Beneficiary. It is clear, that Appellant is attempting to argue he cured the default without having to account for any legal fees or costs incurred to July 8, 1993, even though he admits having fallen behind in payments prior to that point.

POINT V

THE NOTICE OF DEFAULT AGAINST THE APPELLANT WAS SUFFICIENTLY BROAD TO COVER ANY DEFICIENCIES ALLEGED

The Notices of Default, conform to the requirements of Section 57-1-24(1), UCA, as the Appellant admits.

That section provides in pertinent part:

"The power of sale conferred upon the trustee may not be exercised until:

(1) The trustee files for record, in the office of the recorder of each county where the trust property...is situated, a notice of default, identifying the trust deed by stating the name of the trustor named therein and giving the book and page where the trust deed is recorded and a legal description of the trust property, and containing a statement that a breach of any obligation for which the trust property was conveyed as security has occurred, and setting forth the nature of that breach and of his election to sell or cause to be sold the property to satisfy the obligation."

This section is to be coupled with Section 57-1-31, UCA, which provides in pertinent part:

"(1) Whenever all ....of the principal sum of any obligation secured by a trust deed has, prior to the maturity date fixed in such obligation become due or been declared due by reason of a breach or default in the performance of any obligation secured by the trust deed, including a default in the payment of interest or of any installment of principal, or by reason of failure of the trustor to pay, in accordance with the terms of the trust deed, taxes, assessments, premiums for insurance, or advances made by the beneficiary in accordance with the terms of such obligation with the terms of the such obligation or of such trust deed, the trustor....at any time within three months of the filing for record of notice of default under such trust deed, if the power of sale be exercised, may pay to the beneficiary or his successor in interest the entire amount then due under the terms of such trust deed (including costs and expenses actually incurred in enforcing the terms of such obligation, or trust deed, and the trustee's and attorneys's fees actually incurred, other than such portion of the principal as would not then be due had no default occurred, and thereby cure the default theretofore existing, and thereupon, had or instituted shall be dismissed or discontinued and the obligation and trust deed shall be reinstated and shall be and remain in force and effect the same as if no such acceleration had occurred."

Appellant claims, however, the Notice of Default must "plainly" tell the Appellant the nature of its breach. The cite of **Utah State University v. Sutro & Co.**, 646 P.2nd 715, 722 (Utah, 1982) is not convincing on this point. Neither is the case of **Olympus Hills Center, Ltd. V. Smith's Food**, 889 P.2 445 (Utah, 1984). That case deals with defaulted leases, and is not

governed by Section 57-1-24(1). Of course, one would expect that a default in a lease would detail in particularity the various defaults.

Examination of the Notices of Default themselves recorded by the Appellee, however, reveal the requirements of Section 57-1-24(1), UCA have been satisfied. Furthermore, since the default can be cured at any time within 90 days, it is generally not possible to describe exactly what is to be paid prior to the termination of ninety days at the outset of the filing of a Notice of Default, since amounts generally increase, and costs also increase. A person generally is expected to call the Appellee to find out what is necessary to bring all amounts current. The escrow agent, for example, would not necessarily know the amount of legal fees or costs incurred to bring the contracts current

In addition, each notice of default called for an acceleration of the remaining principal balance then due on each of the trust deed notes in the event the Appellant failed to cure the defaults within the ninety-day period. Debt acceleration is a substantive right because it provides a beneficiary with the power to bring a single foreclosure action upon default, thereby satisfying the entire obligation and discharging the note, rather than forcing the Plaintiff to bring repeated collection actions each time the trustor defaults. The beneficiary thereby avoids the burden of repeated foreclosures as well at the risk that the security for the debt, the property, will be consumed by legal fees, court costs, unpaid interest, etc., before the debt is satisfied. **Progressive Acquisition, Inc. v. Lytle**, 806 P.2d 239 (Utah Ct. App., 1991).

POINT VI

EVEN ASSUMING THE ARGUENDO THAT APPELLANT WAS

CURRENT AS OF JULY 8, 1993, THERE CAN BE NO SLANDER OF TITLE WHERE THE APPELLANT FAILS TO MAKE DEMAND *UNDER THE STATUTE TO REMOVE THE* DOCUMENTS CAUSING THE SLANDER.

The Appellant argues that title to his equitable estate in the properties was slandered by the Plaintiff by not having filed a Cancellation of Default as required by Section 57-1-31(1),(1985), UCA. The Appellant claims that the Plaintiff had an obligation to file a Cancellation of Default on the properties once Appellant made the payment to allegedly bring all deficiencies current on July 12, 1993. The problem is that Plaintiff contends he did not bring the payments current, and the undisputed facts support that contention; secondly, the Appellant failed to make any demand upon the Appellant to file any Cancellation of Default once he had paid the $7,245.00 on July 12, 1993 as provided by Section 57-1-31(2), UCA. He is simply not entitled to any damages even if his claims were founded in truth.

CONCLUSION

The Trust Deed Notes and the Trust Deeds given to secure payment under the notes are clear on their faces concerning the rights and duties of the Appellant with respect to the Appellee in respect to payments and other aspects of the contractual rights and obligations.

A simple accounting between the parties reveals that in fact the Appellant fell behind in payments, and did not cure the totality of those defaults by his payment of $7,245.00 on July 12, 1993. He further admits not having made any further payments following that date on any of the contracts to Draper Bank and Trust.

The Appellant cannot successfully challenge the findings of fact and the conclusions of law, since he has elected to waive that right. He is now bound by those findings and legal

conclusions in connection with this appeal.

If the Appellant was in fact in default under the terms of the Contracts, then Plaintiff's actions in foreclosing was valid and Appellant is properly foreclosed under said contracts, and his interest therein have terminated.

This Court should so hold given the undisputed evidence before it.

DATED this 22nd day of December, 1997

DAVID K. SMITH, ESQ.
Attorney for Plaintiff/Appellee

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Brief of Appellee to Counsel for the Appellant/Appellant this 22nd day of December, 1997, postage prepaid, to the following:

Jay R. Mohlman
Scott M. Ellsworth
Nielsen & Senior
Attorneys at Law
1100 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111

DAVID K. SMITH, ESQ.

ADDENDUM

1. Findings of Fact, Conclusions of Law and Order

2. Notice of Appeal

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Attorney for Plaintiff: **TAGE M. NYMAN**

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

TAGE M. NYMAN, Plaintiff, vs. DARYL McDONALD, Defendant.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW** Civil No. 930 906589 Honorable Pat B. Brian

Defendant's Motion for Summary Judgment and Plaintiff's Counter-motion for Summary Judgment having been filed, briefed, and come on regularly for hearing before the Honorable Pat B. Brian, Third District Court Judge in and for Salt Lake County, State of Utah on Friday, April 24, 1997 at 8:30 a.m. in his courtroom on the third floor, at 451 South 2nd East, Salt Lake City, Utah 84111, and Jay R. Mohlman, of Nielsen and Senior, Attorneys and Counsellors at Law appearing for and on behalf of the Defendant, Daryl McDonald, and David K. Smith, Attorney and Counsellor at Law, appearing with and for and on behalf of the Plaintiff, Tage M. Nyman, and the parties previously having submitted their respective brief and affidavits, and/or other exhibits in support of their respective positions, and having argued their respective positions before the Court, and the Court being fully advised in the premises, and having carefully examined the briefs, and other evidence before it, does now make the following:

FINDINGS OF FACT

1. At all times relevant the Plaintiff, TAGE M. NYMAN, was, and still is, a resident of Salt Lake County, State of Utah.

2. At all times relevant herein, the Defendant, DARYL McDONALD, was a resident of the State of California, but claimed an interest in four parcels of real property situated in Salt Lake County, State of Utah, and which is described in paragraph five below..

3. The Court was asked to ascertain the relative interests of the parties with respect to four parcels of real property situated in Salt Lake County, State of Utah described in paragraph five below..

4. At all times relevant to these proceedings, the Plaintiff was the owner of four parcels of real property which had been sold to the Defendant under trust deed and notes, and which were situated in Salt Lake County, State of Utah, with the following addresses:

(A) 110 West Commonwealth Ave.
Salt Lake City, Utah 84115

Sidwell Number: 15-24-227-0000

Legal Description: The East 20 feet of Lot 47, Block 1, ROSELAND ADDITION, according to the official plat thereof, recorded in the Office of the Salt Lake County Recorder, Utah.

Also the following described property:

Beginning 116.13 feet West of the Southeast corner of Lot 1, Block 1, ROSELAND ADDITION; and running thence West 26 feet; thence North 84.9 feet; thence south 56 Degrees 19' East 30.2 feet; thence South 69.5 feet, more or less to the place of beginning.

(B) 1734 South West Temple
Salt Lake City, Utah 84116

Sidwell Number: 15-13-427-007-0000

Legal Description:
Parcel 1: Beginning at the Southeast corner of Lot 12, Block 7 Five Acre Plat "A", BIG FIELD SURVEY, and running thence North 4.35 rods; thence West 9 rods; thence South 4.35 rods; Thence East 9 rods to the point of beginning.

Parcel 2: A non-exclusive easement interest in:
Beginning at a point 9 rods West of the Northeast corner of Said Lot 12, and running thence South 17.4 rods; thence West

1 rod; thence North 17.4 rods; thence East 1 rod to the point of beginning.

(C) 1646 South West Temple
Salt Lake City, Utah 84116

Sidwell Number: 15-13-280-021-0000

Legal Description: All of Lot 1 and the South 11.7 feet of Lot 42, Block 1, RICHLAND ADDITION, a subdivision of Lots 1, 2, 3 and 20, Block 10, Five Acre Plat 'A', BIG FIELD SURVEY.

Less and excepting the following described parcel previously Conveyed to Salt Lake City Corporation:

Beginning at the Southeast corner of Lot 1, Block 1, RICHLAND ADDITION; thence South 89 Degrees 59 Minutes 30 Seconds West 148.500 feet; thence North 0 Degrees 02 Minutes 01 Seconds East 8.273 feet; thence South 89 Degrees 27 Minutes 59 Seconds East 136.862 feet; to a point on a curvature of a 17.00 foot radius curving to the left; thence Northeasterly along the arc of said curve 17.772 feet to the west line of West Temple Street; thence South 0 Degrees 02 Minutes 01 Seconds West 11.451 feet along said West line to the point of beginning.

(D) 124-128 West 1700 South
Salt Lake City, Utah. 84116

Sidwell Number: 05-12-280-026-0000

Legal Description: The East ½ of Lots 2, 3, and 4, Block 1, RICHLAND ADDITION, according to the Official Plat thereof, recorded in the office of the Salt Lake County Recorder, State of Utah.

Less and except the following:

Beginning at the Southwest corner of Lot 2, Block 1, RICHLAND ADDITION; thence North 89 Degrees 59 Minutes 39 Seconds East 149.00 feet; thence North 0 Degrees 02 Minutes 01 Seconds East 8.428 feet; thence North 89 Degrees 27 Minutes 59 Seconds West 135.089 feet; thence South 89 Degrees 59 Minutes 57 Seconds West 1.931 feet to a point on a curvature of a 17.00 foot radius curve to the Right; thence Northwesterly along the arc of said curve 13.298 feet To the East line of Jefferson Street; thence South 0 Degrees 02 Minutes 01 Seconds West 14.642 feet along said East line to the point of Beginning.

5. The Defendant, DARYL McDONALD, had previously entered into a purchase agreement to purchase the four properties from a PATRICK McCAULEY, in approximately August, 1992, and had had possession of the four properties from approximately August, 1992 until the sale

by the Plaintiff to the Defendant on February 8, 1993.

6. All of the properties in question were older structures and were in need of deferred maintenance and upkeep.

7 The properties were sold by the Plaintiff to the Defendant via Trust Deeds and Notes dated February 8, 1993.

8. In addition to the Trust Deeds and Trust Deed Notes, and the Escrow Agreements signed by the parties for each of the parcels in question, the parties also executed at closing a Purchase Agreement. General terms of each agreement were set forth in the Purchase Agreement.

9. The parties chose as their escrow agent for purposes of receiving and disbursing funds received from the Defendant on the various properties, Draper Bank and Trust, Draper, Utah.

10. The Defendant had maintained possession of the properties for approximately five months prior to the closing on February 8, 1993. Because of that fact, the Defendant was aware of the deteriorated condition of each of the properties prior to February 8, 1993; nevertheless the Defendant agreed to purchase the properties in an "as is" condition from the Plaintiff.

11. The Defendant further knew that the Salt Lake County Health Department had closed the property at 110 West Commonwealth to human habitation in April, 1993, two months after the closing on February 8, 1993.

12. The Defendant made no further monthly payments due under the trust deed at 110 West Commonwealth after it had been shut down by the Health Department in April, 1993.

13. On June 18, 1993, the Plaintiff caused Notices of Default against three of the properties to be filed with the Salt Lake County Recorder's Office, claiming a breach of the obligations by the Defendant under the terms of the Trust Deed and/or Trust Deed Notes. The properties listed were (A) 110 Commonwealth Ave., (B) 1734 South West Temple, and (C) and 1646 South West Temple.

14. An additional Notice of Default was recorded on October 23, 1993 against the fourth property, 124-128 West 1700 South, claiming the Defendant had defaulted also on the terms on conditions of the Trust Deed and Trust Deed Note. The Plaintiff then elected pursuant to the terms of the Trust Deed to accelerate the balance due on the note.

15. On or about July 12, 1993, the Defendant tendered to Draper Bank and Trust, the escrow

agent for the parties, an Official Check for $6,900.00 plus a cash payment of $345.00.

16. The Defendant failed to entirely cure the deficiencies with his payment of $7,245.00 on July 12, 1993, and no cure was thereafter effected on any of the properties.

17. The Defendant made no further attempts following July 12, 1993 to tender or make further payments on any of the properties to Draper Bank & Trust under the terms of the escrow agreement with the Plaintiff.

18. The Defendant should have paid to Draper Bank and Trust the sum of $14,212.50 from between February 8, 1993 and July 12, 1993. The total payments actually received by Draper Bank and Trust during the period in question from the Defendant was only $11,845.00. Total funds Daryl McDonald was deficient as of July 12, 1993 was $2,367.50 less rent that Tage M. Nyman collected prior to 4/20/93 of $1,050.00, leaving a deficiency still due as of July 12, 1993 of $1,117.50.

19. The Defendant made no effort to ascertain the amount of or to pay any of Plaintiff's legal fees or costs incurred in connection with the foreclosure prior to July 12, 1993 when he made his July 12, 1993 payment to Draper Bank and Trust.

20. The Defendant was responsible for Plaintiff's legal fees and costs of foreclosure to that date under the trust deeds and trust deed notes incurred up to July 12, 1993 if he was to have cured the default.

21. Furthermore, the Defendant had been placed on notice by letter dated April 20 1993 from the Plaintiff that a default under the contract had occurred inasmuch as he had never received proof of fire insurance on the four properties; said proof of fire insurance on the properties was never provided to the Plaintiff.

CONCLUSIONS OF LAW

1. The Court maintains jurisdiction over the parties to this action and over the subject matter of this action.

2. The parties entered into written documents represented by Trust Deed Notes secured by Trust Deeds dated February 8, 1993 for the purchase by the Defendant from the Plaintiff for each of the four parcels in question which are more particularly described in paragraph four of the Findings of Fact..

3. Each of the parties are bound by the terms and conditions of those Trust Deed Notes and Trust Deeds with respect to the four properties in question.

4. For purposes of adjudication on the mutual motions of the parties for summary judgment, the Court finds there is no genuine issue as to any material fact and that the Plaintiff is entitled to judgment as a matter of law. The Court also finds as a matter of law that the Defendant's Motion for Summary Judgment should be dismissed with prejudice. In making such a finding the Court has not considered the weight to be given to any particular piece of evidence, nor has it considered the credibility to be afforded any affidavit or of any of the witnesses through their depositions, and has looked at all facts most favorably in Defendant's favor.

5. The Court notes that the Defendant presented no affidavit in support of his motion for summary judgment, and that he relied upon the pleadings, previous affidavits filed, and the depositions of the parties, which were ordered "published" for purposes of hearing this matter.

6. The Court, for purposes of this motion, has interpreted the meaning of the trust deeds and trust deed notes, the document entitled "Purchase Agreement" and escrow agreements executed by and between the parties in connection with the transaction which is the subject matter of this lawsuit.

7. Taken as a whole the Court finds that the Defendant was in fact in default of the four contracts in question after applying the Defendant's payment of July 12, 1993, and finds that the Defendant knew he was in default almost from the beginning of the execution of the trust deeds and notes with respect to the parcels.

8. The Defendant knew that one of the properties, 110 West Commonwealth Ave., Salt Lake City, Utah, had been condemned to human habitation in April, 1993, and he failed to make payments on that property prior to the filing of the notice of default by the Plaintiff.

9. Neither the Defendant, personally, nor through third parties made any further payments on any of the trust deed notes connected with any of the properties after July 12 1993.

10. Draper Bank and Trust acted as the Escrow Agent for both the Plaintiff and the Defendant with respect to receipt of funds from the Defendant on the four trust deed notes and with respect to disbursement of funds. Draper Bank and Trust did not and could not bind either party with respect to whether a default under the terms and conditions of the trust deed notes and/or the

respective trust deeds had occurred.

11. In respect to the funds actually received by Draper Bank and Trust from the Defendant, the Court finds their accounting and application of funds to each of the contracts is accurate.

12. The Defendant never paid to Draper Bank and Trust or to the Plaintiff directly the sums which became due on March 23, 1993 on any of the trust deed notes.

13. The Court finds that the payment due on March 23, 1993 was known to the Defendant and was not in the nature of a balloon payment.

14. The Court finds that Draper Bank and Trust was not responsible for determining whether a default either existed or was cured as between the Plaintiff and the Defendant, and could not bind either party on the question of whether a default existed or was cured as to any particular parcel of property.

15. The properties remained in disrepair following the execution of the closing documents on February 8, 1993, some of which caused a default in the terms and conditions of the trust deeds as of July 12, 1993.

16. The fact that the Defendant failed to appraise the Plaintiff of the existence of fire insurance of the four parcels prior to July 12, 1993 was a default in the terms and conditions of the trust deeds.

17. The Defendant was in default of the terms and conditions of the trust deeds and the trust deed notes as of July 12. 1993 and no complete cure was effectuated by the Defendant thereafter..

18. The Court finds that in all respects the Plaintiff's properly complied with Section 57-1-1, et. seq., Utah Code Annotated, 1953 as revised and amended, and particularly with Sections 57-1-24, 57-1-25, 57-1-27, and 57-1-37, UCA in connection with his filing Notices of Default on the subject properties, and in non-judicially foreclosing the same.

19. Any interest which the Defendant had in said properties, or any other persons who claim some right, title or interest in the subject properties, by, through or under him should be ordered quieted in favor of the Plaintiff.

20. Any Notices of Interests and/or Notices of Liens filed against any of the properties by the Defendant or by anyone claiming title by, through or under him should be ordered withdrawn.

21 Pursuant to the terms and conditions of the Trust Deeds and the Trust Deed Notes executed by the Defendant, the Plaintiff should be entitled to a reasonable attorney's fee in defending this action against the Defendant's claims in this matter.

22. The Defendant's Causes of Action, including the cause of action for slander of title, should be ordered "dismissed with prejudice and on the merits."

22. The Plaintiff should be entitled to his costs incurred in this action.

DATED this 10 day of June, 1997.

BY THE COURT

PAT B. BRIAN
THIRD DISTRICT COURT JUDGE

APPROVED AS TO FORM:

JAY R. MOHLMAN
Attorney for Daryl McDonald

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of **FINDINGS OF FACT AND CONCLUSIONS OF LAW** to Counsel for the Defendant and to Counsel for the Intervenors, , postage prepaid, addressed as follows this 4th day of June, 1997:

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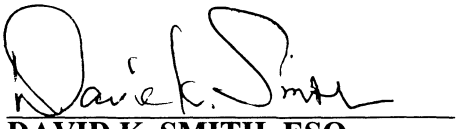

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June 4, 1997

Honorable Pat B Brian
Third District Court Judge
Metropolitan Hall of Justice
240 East 4th South
P.O. Box 1860
Salt Lake City, Utah 84110

Re: Tage M. Nyman
vs.
Daryl McDonald
Civil No. 930906589

Dear Judge Brian:

In concert with your order from the bench on April 18, 1997, and pursuant to Rule 4.501(2), and Rule 4.504(2), Utah Rules of Judicial Administration, I served opposing counsel and interested parties with copies of the proposed Findings of Fact and Conclusions of Law and Order on May 27, 1997.

Mr. Ronald G. Russell provided me with proposed changes which I have incorporated into the enclosed Findings of Fact, Conclusions of Law and Order. I have received no comment from Mr. Mohlman and more than five days have elapsed since service was made upon him.

I am now submitting these documents to you for review and execution.

Yours very truly,

DAVID K. SMITH, ESQ.
Attorney at Law

DKS/js
Encls.
cc: Jay Mohlman, Esq.
Ronald G. Russell, Esq.

JUDGEMENT

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Attorney for Plaintiff: **TAGE M. NYMAN**

FILED DISTRICT COURT
Third Judicial District

JUN 10 1997

By _____

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

	)	2215785
TAGE M. NYMAN,	)	6-11-97-8.02AM
Plaintiff,	)	**ORDER**
	)	
vs.	)	Civil No. 930 906589
DARYL McDONALD,	)	Honorable Pat B. Brian
Defendant.	)	

BASED UPON the Findings of Fact and Conclusions of Law heretofore entered in the above proceedings, the Court does now enter the following ORDER:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The Court maintains jurisdiction over the parties to this action and over the subject matter of this action.

2. *Defendant's Motion for Summary Judgment is denied with prejudice and on its merits..*

3. Plaintiff's motion for Summary Judgment is granted.

4. Any interest which the Defendant had in the properties described below, or any other persons who claim some right, title or interest in the said properties by, through or under him is ordered quieted in favor of the Plaintiff.

(A) 110 West Commonwealth Ave.
Salt Lake City, Utah 84115

Sidwell Number: 15-24-227-0000

Legal Description: The East 20 feet of Lot 47, Block 1, ROSELAND ADDITION, according to the official plat thereof, recorded in the Office of the Salt Lake County Recorder, Utah.

Also the following described property:

Beginning 116.13 feet West of the Southeast corner of Lot 1, Block 1, ROSELAND ADDITION; and running thence West 26 feet; thence North 84.9 feet; thence south 56 Degrees 19' East 30.2 feet; thence South 69.5 feet, more or less to the place of beginning.

(B) 1734 South West Temple
Salt Lake City, Utah 84116

Sidwell Number: 15-13-427-007-0000

Legal Description:
Parcel 1: Beginning at the Southeast corner of Lot 12, Block 7 Five Acre Plat "A", BIG FIELD SURVEY, and running thence North 4.35 rods; thence West 9 rods; thence South 4.35 rods; Thence East 9 rods to the point of beginning.

Parcel 2: A non-exclusive easement interest in:
Beginning at a point 9 rods West of the Northeast corner of Said Lot 12, and running thence South 17.4 rods; thence West 1 rod; thence North 17.4 rods; thence East 1 rod to the point of beginning.

(C) 1646 South West Temple
Salt Lake City, Utah 84116

Sidwell Number: 15-13-280-021-0000

Legal Description: All of Lot 1 and the South 11.7 feet of Lot 42, Block 1, RICHLAND ADDITION, a subdivision of Lots 1, 2, 3 and 20, Block 10, Five Acre Plat 'A', BIG FIELD SURVEY.

Less and excepting the following described parcel previously Conveyed to Salt Lake City Corporation:

Beginning at the Southeast corner of Lot 1, Block 1, RICHLAND ADDITION; thence South 89 Degrees 59 Minutes 30 Seconds West 148.500 feet; thence North 0 Degrees 02 Minutes 01 Seconds East 8.273 feet; thence South 89 Degrees 27 Minutes 59 Seconds East 136.862 feet; to a point on a curvature of a 17.00 foot radius curving to the left; thence Northeasterly along the arc of said curve 17.772 feet to the west line of West Temple Street; thence South 0 Degrees 02 Minutes 01 Seconds West 11.451 feet along said West line to the point of beginning.

(D) 124-128 West 1700 South
Salt Lake City, Utah. 84116

Sidwell Number: 05-12-280-026-0000

Legal Description: The East ½ of Lots 2, 3, and 4, Block 1, RICHLAND ADDITION, according to the Official Plat thereof, recorded in the office of the Salt Lake County Recorder, State of Utah.

Less and except the following:

Beginning at the Southwest corner of Lot 2, Block 1, RICHLAND ADDITION; thence North 89 Degrees 59 Minutes 39 Seconds East 149.00 feet; thence North 0 Degrees 02 Minutes 01 Seconds East 8.428 feet; thence North 89 Degrees 27 Minutes 59 Seconds West 135.089 feet; thence South 89 Degrees 59 Minutes 57 Seconds West 1.931 feet to a point on a curvature of a 17.00 foot radius curve to the Right; thence Northwesterly along the arc of said curve 13.298 feet To the East line of Jefferson Street; thence South 0 Degrees 02 Minutes 01 Seconds West 14.642 feet along said East line to the point of Beginning.

5. Any Notices of Interests and/or Notices of Liens filed against any of the properties by the Defendant or by anyone claiming title by, through or under him is ordered withdrawn.

6. The Plaintiff is entitled to a reasonable attorney's fee in defending this action against the Defendant's claims in this matter.

7. The Defendant's Causes of Action, including the cause of action for slander of title, are ordered "dismissed with prejudice and on the merits."

8. The Plaintiff is entitled to his costs incurred in this action.

DATED this 10 day of June, 1997.

BY THE COURT

PAT B. BRIAN
THIRD DISTRICT COURT JUDGE

APPROVED AS TO FORM:

JAY R. MOHLMAN
Attorney for Daryl McDonald

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing **ORDER** to Counsel for the Defendant and to Counsel for the Intervenors, , postage prepaid, addressed as follows this 4th day of June, 1997:

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IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

TAGE NYMAN, Plaintiff/Appellee, vs. DARYL McDONALD, Defendant/Appellant.	**NOTICE OF APPEAL** Civil No. 930906589 Judge Pat B. Brian

Notice is hereby given that Defendant Daryl McDonald, by and through counsel, Jay R. Mohlman and Scott M. Ellsworth of Nielsen & Senior, appeals to the Utah Supreme Court the Order granting Plaintiff's Motion for Summary Judgment and the other items contained in that Order of the Honorable Pat B. Brian entered in this matter on the 10th day of June, 1997.

DATED this 2nd day of July, 1997.

Jay R. Mohlman
Scott M. Ellsworth
of **NIELSEN & SENIOR**

70490.MC169.001

CERTIFICATE OF SERVICE

I hereby certify that upon this 2nd day of July, 1997, I caused a true and correct copy of the above **NOTICE OF APPEAL**, to be mailed, first-class United States mail, postage prepaid, to the following:

David K. Smith, Esq.
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